



on June 16, 2005, provided by David Bindi, owner of David Bindi Construction, in no way resembles the testimony of claimant and claimant's roommate and co-worker, Terrence Petrey.

Either claimant was offered a job with respondent, or he wasn't. Claimant either worked for respondent that day, or he didn't. And claimant either was injured on the job on that day, or he wasn't. It is nearly impossible to determine from this record who is telling the truth.

The ALJ, in awarding benefits to claimant, apparently believed claimant's and claimant's co-worker's descriptions of the day's events. Claimant's testimony that he was offered employment by Mr. Bindi during a telephone conversation, and that he and Mr. Petrey reported to the job, worked for several hours, and then claimant suffered an accidental injury while helping raise a garage door wall, was supported by the testimony of Mr. Petrey. Mr. Bindi's testimony that claimant was not hired that day, did not work for him and did not suffer an injury at the job site was apparently rejected by the ALJ.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>2</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.<sup>3</sup>

The Board has, in the past, given some deference to an administrative law judge's opportunity to observe the live testimony of witnesses. That opportunity allows the administrative law judge to assess the credibility of those witnesses and decide the issues accordingly. Here, the ALJ apparently found the testimony of claimant and claimant's roommate, Mr. Petrey, to be the more credible. The Board agrees and finds, for preliminary hearing purposes, that claimant did suffer accidental injury arising out of and

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<sup>1</sup> K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

<sup>2</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>3</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

in the course of his employment with respondent. The award of benefits to claimant and against the Fund is, therefore, affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order and the Order Nunc Pro Tunc of Administrative Law Judge Steven J. Howard, dated June 21, 2006, and June 23, 2006, respectively, should be, and are hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2006.

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BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant  
Mark A. Rohrbaugh, Attorney for Respondent  
Derek R. Chappell, Attorney for the Fund  
Steven J. Howard, Administrative Law Judge